Supreme Court, U.S.
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No. 03-534

IN THE

Supreme Court of the United States

ELIZABETH FEASTER,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT OF HEALTH, BOARD OF NURSING,

Respondent,

On Petition For Writ Of Certiorari To The
District Court of Appeal, First District, State of Florida

REPLY TO BRIEF IN OPPOSITION TOTHE PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

ARGUMENTS 1

RESPONDENT MISREPRESENTS THE ARGUMENTS AND RULINGS MADE BELOW IN THE FLORIDA TRIAL AND APPELLATE COURTS

.....1

THE TRIAL COURT EXPRESSLY RULED THAT THE ELEVENTH AMENDMENT BARS SUIT FOR MONEY DAMAGES UNDER TITLE II OF THE ADA

.....1

THE FLORIDA DISTRICT COURT OF APPEAL AFFIRMED THE TRIAL COURT'S RULING PER CURIAM CITING ELEVENTH AMENDMENT CASES

.....3

FBN ARGUED IN THE FLORIDA APPELLATE COURT BASED UPON THE ELEVENTH AMENDMENT

.....3

FBN ARGUED FOR DISMISSAL IN THE FLORIDA TRIAL COURT BASED UPON THE ELEVENTH AMENDMENT

.....4

TABLE OF CITED AUTHORITIES

Feaster v. State of Florida, Department of Health, Board of Nursing, 846 So.2d 1238 (Fla. 1st DCA June 9, 2003)

.....1

Board of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356(2001)

.....3,5

Ass'n for Disabled Ams., Inc. v. Fla. Int'l Univ., 178 F.Supp.2d 1291 (S.D.Fla.2001);

.....3

Dep't of Highway Safety & Motor Vehicles v. Rendon, 832 So.2d 141 (Fla. 3d DCA 2002).

.....3

Alden v. Maine, 527 U.S. 706 (1999)

.....4,6

RESPONDENT MISREPRESENTS THE ARGUMENTS AND RULINGS MADE BELOW IN THE FLORIDA TRIAL AND APPELLATE COURTS

Petitioner, Elizabeth Feaster ("Feaster"), replies to the Brief in Opposition filed by Respondent, State of Florida, Department of Health, Board of Nursing ("FBN") to address misstatements made regarding the arguments and rulings made in the Florida trial and appellate courts.

FBN falsely claims the arguments and decisions in the Florida courts were not based upon the Eleventh Amendment. On page 3 of the Brief in Opposition, FBN states as follows:

> "Petitioner asks this Court to decide whether the Eleventh Amendment bars her state court action for damages. Of course, neither of the lower courts so ruled, and the Board did not argue an Eleventh Amendment bar." (Underline added).

The statement by FBN underlined above is not accurate. The statement is untrue and this is demonstrated by the cases cited in the Florida appellate court opinion in this case, *Feaster v. State of Florida, Department of Health, Board of Nursing*, 846 So.2d 1238 (Fla. 1st DCA June 9, 2003) and the ruling of the Florida trial court included in the Appendix to the Petition for Writ of Certiorari and FBN's motion to dismiss, memorandum of law in support of its motion to dismiss filed in the Florida trial court and FBN's Answer Brief filed in the Florida appellate court, which are included in the Appendix to this Reply Brief.

THE TRIAL COURT EXPRESSLY RULED THAT THE ELEVENTH AMENDMENT BARS SUIT FOR MONEY DAMAGES UNDER TITLE II OF THE ADA

The ruling of the trial court is provided in full in the Appendix to the Petition for Writ of Certiorari. The trial court expressly ruled that the Eleventh Amendment bars suit under Title II of the Americans with Disabilities Act. The relevant excerpt of the ruling was as follows:

> "Conclusions of Law
>
> The United States Supreme Court holds that the **Eleventh Amendment** bars ADA suits by private citizens against states for money damages. ***Board of Trustees of the Univ. of Alabama v. Garrett***, 531 U.S. 356(2001); see also ***Association for Disabled Ams.. Inc. v. Florida Int'l Univ.***,. 178 F. Supp. 2d 1291 (S.D. Fla. 2001) (holding that the **Eleventh Amendment bars suit under Title II of the ADA**). The high court, in so holding, reversed the contrary conclusion of Eleventh Circuit Court of Appeals. *See Garrett v. University of Alabama Bd. of Trustees*, 261 F.3d 1242 (11th Cir. 2001) (after remand from the United States Supreme Court, holding that action for money damages for state's failure to comply with the ADA are barred by the **Eleventh Amendment**), reversed in part on other grounds, 276 F.3d 1227 (11th Cir. 2001) (remanding for determination whether the state, by accepting federal financial assistance waived immunity under the Rehabilitation Act). **The applicant's reliance upon the lower court *Garrett* case**, and upon a footnote in the supreme court's ***Garrett*** case, thus is misplaced in view of the *Garrett* language on remand, and the express holding of ***Association for Disabled Americans***. (Underline and bold emphasis added).

The trial court's ruling agreed with and followed the appellate cases that have interpreted *Board of Trustees of the Univ. of Alabama v. Garrett,* 531 U.S. 356(2001) to require a finding that the Eleventh Amendment bars suit for damages under Title II of the ADA. The trial court's ruling was based squarely upon the Eleventh Amendment.

THE FLORIDA DISTRICT COURT OF APPEAL AFFIRMED THE TRIAL COURT'S RULING PER CURIAM CITING ELEVENTH AMENDMENT CASES

FBN likewise misrepresents the Florida Appellate Court ruling. The First District Court of Appeal opinion is provided in the Appendix to the Petition for Writ of Certiorari. It follows the decisions in *Ass'n for Disabled Ams., Inc. v. Fla. Int'l Univ.,* 178 F.Supp.2d 1291 (S.D.Fla.2001); *Dep't of Highway Safety & Motor Vehicles v. Rendon,* 832 So.2d 141 (Fla. 3d DCA 2002). Both decisions are Eleventh Amendment cases.

FBN ARGUED IN THE FLORIDA APPELLATE COURT BASED UPON THE ELEVENTH AMENDMENT

FBN's Answer Brief filed in the Florida First District Court of Appeal acknowledges the issue on appeal as follows:

> **"WHETHER CONGRESS PROPERLY ABROGATED THE ELEVENTH AMENDMENT THROUGH TITLE II OF THE AMERICANS WITH DISABILITIES ACT, THEREBY OVERCOMING A STATE'S SOVEREIGN IMMUNITY FROM SUIT UNDER FEDERAL LAW IN ITS OWN COURTS.**
>
> **A. <u>Title II of the ADA Does Not Properly Abrogate the Eleventh Amendment</u>"**

(Bold emphasis in original).

The entire Answer Brief of FBN is included in the Appendix to this Reply Brief.

FBN ARGUED FOR DISMISSAL IN THE FLORIDA TRIAL COURT BASED UPON THE ELEVENTH AMENDMENT

FBN's Brief in Opposition also misstates the argument it made to the Florida trial court by claiming that it did not argue an Eleventh Amendment bar. On page 3 of the Brief in Opposition, FBN states as follows:

> "The Board argued that Congress did not properly abrogate the States' sovereign immunity under its Fourteenth Amendment powers, and that petitioner's action was foreclosed under *Alden v. Maine*, 527 U.S. 706 (1999) because Florida had not waived its immunity to an ADA action in its own courts."

FBN's motion to dismiss and memorandum of law filed in the Florida trial court in opposition to Feaster's ADA complaint are provided in full in the Appendix to this Reply Brief. The argument stated above is fallacious. It is not the argument FBN made in the Florida trial and appellate courts.

An excerpt of FBN's memorandum of law demonstrates that its argument was based upon on Eleventh Amendment grounds. FBN states as follows:

> "A. AS A STATE ENTITY, THE BOARD IS IMMUNE FROM SUIT FOR DAMAGES UNDER THE AMERICANS WITH DISABILITIES ACT

The **Eleventh Amendment** to the United States Constitution provides that the federal power can only be wielded against states in limited circumstances.

To be subjected to federal civil rights legislation in federal or state court, the State's **Eleventh Amendment** and sovereign immunity must both be waived. The **Eleventh Amendment immunity** can only be waived by Congress enacting appropriate legislation under Section 5 of the 14th Amendment.

The United States Supreme Court ruled in ***Board of Trustees of the University of Alabama v. Garrett,*** 121 S.Ct. 955, 531 U.S. 356, 148 L.Ed.2d 866 (2001), that Congress did not properly abrogate the states' **Eleventh Amendment immunity** when it enacted Title I of the Americans With Disabilities Act. Title I of the ADA is not appropriate enforcement legislation, the Court ruled, because Congress exceeded its constitutional authority under the 14th Amendment. Garrett, 531 U.S. at 360. Congress exceeded its authority by proscribing certain state action as unlawful discrimination and making the states amenable to private suits for damages without first making record findings that states had historically and irrationally discriminated against the disabled. Id. at 357-58. "

(Underline and bold emphasis added).

FBN's reference to the 14th Amendment above is made in context of the Eleventh Amendment in discussing the *Garrett* decision. For FBN to construe its argument as a 14th Amendment and not an 11th Amendment argument, it would have to likewise construe *Garrett* as a 14th Amendment case and not an 11th Amendment case, which is ludicrous.

FBN also states incorrectly that it raised *Alden v. Maine* as an independent ground from the 11th Amendment. FBN's memorandum of law clearly raises *Alden* in the context of an Eleventh Amendment. The relevant portion of the memorandum states as follows:

> "Moreover, the State of Florida can not be sued under Title I (sic) of the ADA for damages in state court. *Alden v. Maine*, 119 S. Ct. 2240, 527 U.S. 706, 144 L. Ed. 2d (1999). This immunity from suit in state court rests on the state's historic immunity from suit, which is extent until and unless it has been properly abrogated through Congressional action against the **Eleventh Amendment** or properly waived through the State's own waiver of its **Eleventh Amendment immunity** and its sovereign immunity. *Id.* at The State of Florida has not waived its **Eleventh Amendment immunity**, nor has it waived its sovereign immunity from suit under federal claims. See Fla. Stat. § 111.071(4), 768.28 (1), (17). As the United States Supreme Court explained in *Alden v. Maine*, if Congress has not abrogated the state's **Eleventh Amendment immunity** through federal legislation, and the state has not waived its **Eleventh Amendment immunity** or its sovereign immunity as to any

> particular federal claim, then the State can not be sued in any court on that federal claim. (Underline and bold emphasis added).

The above excerpts and FBN's memorandum of law provided in full in the Appendix demonstrates that it relied upon an Eleventh Amendment argument to oppose Feaster's ADA complaint. FBN's statements to the contrary in the Brief in Opposition are inaccurate and untrue.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

ELIZABETH FEASTER,

Plaintiff,

vs. CASE NO. 01-07361 CA

STATE OF FLORIDA, DEPARTMENT OF HEALTH, BOARD OF NURSING,

Defendant.

_____/

THE BOARD' S MOTION TO DISMISS

Pursuant to Florida Rule of Civil Procedure 1.140(b) (2) and 1.140(b) (6), the State of Florida, Department of Health, Board of Nursing (the "Board") moves to dismiss the Complaint filed by Elizabeth Feaster ("Feaster") and says:

1. This Court does not have personal jurisdiction over the Board because the Board is immune from suit for damages under Title II of the Americans With Disabilities Act (the "ADA").

2. This Court does not have personal jurisdiction over the Board because the Board is immune from suit for injunctive relief under Title II of the ADA.

3. Alternatively, Feaster fails to state a cause of action under Title II of the ADA because she is not an otherwise qualified individual with a disability.

4. Alternatively, Feaster fails to state a cause of action under Title II of .the ADA because, as a matter of law, the Board's actions are lawful under the necessity exception to the ADA.

5. Alternatively, Feaster fails to state a cause of action under Title II of the ADA because, as a matter of law, the Board's actions are lawful under the direct threat exception to the ADA.

6. Alternatively, Feaster fails to state a cause of action under Title II of the ADA because, as a matter of law, the .Board's actions are lawful under the ADA.

WHEREFORE, the Board respectfully requests that this Court enter an Order dismissing Feaster's Complaint with prejudice.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by facsimile and by U.S. Mail to James N. Charles, Esquire, 217 Celebration Blvd., Celebration, Florida

34747, this 3d day of December, 2001.

LESLEI G. STREET

cc: Edward Tellechea-

APPENDIX B

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

ELIZABETH FEASTER,

Plaintiff,

vs. CASE NO. 01-07361 CA

STATE OF FLORIDA, DEPARTMENT OF HEALTH, BOARD OF NURSING,

Defendant.

_____/

THE BOARD'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

The State of Florida, Department of Health, Board of Nursing (the "Board"), moves to dismiss the Complaint filed by Elizabeth Feaster ("Feaster") for lack of jurisdiction and failure to state a cause of action. The Court does not have jurisdiction over the Board because it is immune from suit for damages under Title II of the Americans With Disabilities Act and because the Court can not issue an injunction against the Board. Feaster's Complaint does not state a cause of action because. she is not an otherwise qualified individual with a disability, because the Board's actions fall within a statutory exception, or because the Board's actions are otherwise lawful. The legal bases for these reasons are set out below.

I. THIS COURT LACKS JURISDICTION

A State is immune from suit unless its immunity has been properly waived. In this case, because the State's immunity from suit for damages under the ADA has not been waived, and because the Board is a state entity, it can not be sued under the ADA. This result is the same whether the suit is brought in state court or in federal court. In addition, this Court can not enjoin the Board. Only a public official in his or her official capacity can be enjoined from taking actionin violation of a federal statute such as the ADA.

A. AS A STATE ENTITY, THE BOARD IS IMMUNE FROM SUIT FOR DAMAGES UNDER THE AMERICANS WITH DISABILITIES ACT

The Eleventh Amendment to the United States Constitution provides that the federal power can only be wielded against states in limited circumstances.

To be subjected to federal civil rights legislation in federal or state court, the State's Eleventh Amendment and sovereign immunity must both be waived. The Eleventh Amendment immunity can only be waived by Congress enacting appropriate legislation under Section 5 of the 14th Amendment.

The United States Supreme Court ruled in Board of Trustees of the University of Alabama v. Garrett, 121 S.Ct. 955, 531 U.S. 356, 148 L.Ed.2d 866 (2001), that Congress did not properly abrogate the states' Eleventh Amendment immunity when it enacted Title I of the Americans With Disabilities Act. Title I of the ADA is not appropriate enforcement legislation, the Court ruled, because Congress exceeded its constitutional authority under the 14tk~ Amendment. Garrett, 531 U.S. at 360. Congress exceeded its

authority by proscribing certain state action as unlawful discrimination and making the states amenable to private suits for damages without first making record findings that states had historically and irrationally discriminated against the disabled. Id. at 357-58.

Moreover, the State of Florida can not be sued under Title I of the ADA for damages in state court. Alden v. Maine, 119 S. Ct. 2240, 527 U.S. 706, 144 L. Ed. 2d (1999). This immunity from suit in state court rests on the state's historic immunity from suit, which is extant until and unless it has been properly abrogated through Congressional action against the Eleventh Amendment or properly waived through the State's own waiver of its Eleventh Amendment immunity and its sovereign immunity. Id. at The State of Florida has not waived its Eleventh Amendment immunity, nor has it waived its sovereign immunity from suit under federal claims. See Fla. Stat. § 111.071(4), 768.28 (1), (17). As the United States Supreme Court explained in Alden v. Maine, if Congress has not abrogated the state's Eleventh Amendment immunity through federal legislation, and the state has not waived its Eleventh Amendment immunity or its sovereign immunity as to any particular federal claim, then the State can not be sued in any court on that federal claim.

Feaster's claim under Title II is subject to the same legal analysis. Congress passed Title II at the same time and with the same factual findings as Title I. Because Congress failed to identify a history and pattern of irrational discrimination as to Title I of the ADA, it likewise must have failed to identify a history and pattern of irrational discrimination as to Title II of the ADA. See Garcia v. S.U.N.Y. Health Sciences Center, 2001 WL 1159970 (2d Cir. Sept. 26, 2001); Thompson v. Colorado, 258 F.3d 1241 (10th Cir. 2001); see also Attachment 1 (Association for Disabled Americans, Inc. v. Florida International Univ., 2001 WL

1669423 (S.D. Fla. Dec. 12, 2001) (holding that the State of Florida is immune from suit for damages under Title II of the ADA)).

Moreover, because the State of Florida has not waived its Eleventh Amendment immunity or its sovereign immunity from suit under Title II of the ADA, Feaster can not sue the State of Florida for damages under Title II of the ADA. Feaster's claim must therefore be dismissed with prejudice.

B. THE BOARD CAN NOT BE ENJOINED FROM VIOLATING THE ADA

Injunctive relief is only available against an individual public official acting ultra vires in his or her official capacity. Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908). No public official is named in Feaster's suit, and the Board can not be enjoined.

II. FEASTER FAILS TO STATE A CAUSE OF ACTION UNDER THE ADA

A. FEASTER IS NOT AN OTHERWISE QUALIFIED INDIVIDUAL WITH A DISABILITY

Feaster has not passed the test and until she does her claims are moot.

Assuming she does, she is still not ipso facto an otherwise qualified individual with a disability. First, the Board does not know whether she is disabled within the meaning of Title II of the ADA. It seeks information in order to make that determination. Second, even if Feaster does have a disability within the meaning of the ADA, she can only be otherwise qualified if, with or without reasonable

accommodations, she can meet the licensing requirements. The licensing requirements include the ability to practice with the necessary skill and safety. Again the Board can not know whether Feaster can practice with the necessary skill and safety until it has received a doctor's expert opinion on that matter, including an opinion on what, if any, accommodations may be necessary.

B. THE BOARD'S LICENSING DECISIONS ARE EXEMPT FROM THE ADA BECAUSE THE BOARD'S DECISIONS SAFEGUARD PUBLIC SAFETY

Title II of the ADA prohibits a public entity from discriminating, excluding or denying a qualified individual with a disability participation in or the benefits of the services, programs, or activities of that public entity on the basis of that individual's disability. 42 U.S.C. § 12132. A state's duty to regulate licensure of physicians is not a service, program, or activity provided by a state within the meaning of the ADA. As the court stated in Alexander v. Margolis, 921 F. Supp. 482, 488 (W.D. Mich. 1995), aff'd, 98 F.3d 1341 (6th Cir. 1996) "The Board of Medicine is, if anything, a service, program or activity provided for the public's benefit and safety, not for the benefit of any given individual, who does not meet the state's requirements for practicing medicine." Even if Title II of the ADA does apply to a state's licensing decisions, those decisions are made pursuant to the state's fundamental mission to protect the Cafety of the public and are therefore within the necessity exception to the ADA.

1. LICENSING IS EXEMPT UNDER THE BUSINESS NECESSITY EXCEPTION

The Board's referral to IPN is not a violation of Title

II of the ADA because it is a business necessity. Equal Employment Opportunity Commission v. Exxon, 203 F.3d 871 (5th Cir. 2000).

2. LICENSING IS EXEMPT UNDER THE DIRECT THREAT EXCEPTION

The Board's referral to IPN is not a violation of Title II of the ADA because it falls within the direct threat exception. That is, if Feaster has one or more mental or physical conditions that preclude her from practicing nursing with skill and safety, and the Board is precluded from finding out about it, then Feaster is a direct threat to the public safety. See, EEOC v. Exxon, supra.

The Florida Board of Nursing is charged with the responsibility of preserving in the practice of nursing the health, safety, and welfare of. the public under the police powers of the State. Fla. Stat. § 455.201; 458.307, .309, .311, .331. This grave responsibility encompasses ensuring that no nurse in the State is "unable to practice medicine with reasonable skill and safety to patients . . . as a result of any mental or physical condition." Fla. Stat. § 458.331(1) (s). Thus, it is the Board's fundamental duty to ensure that Feaster's mental or physical conditions would not preclude her from practicing medicine with reasonable safety to patients.

This duty falls squarely within the necessity exception to Title II of the ADA. That exception, put forth in the implementing regulations, provides:

> A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability from fully and

> equally enjoying any service, program, or activity, unless such Feaster v. Board of Nursing criteria can be shown to be necessary for the provision of that service, program, or activity being offered.

28 C.F.R. § 35.130(b) (8). Thus, a state may use eligibility criteria that screen out or tend to screen out individuals with disabilities if the criteria are necessary to ensure the health or safety of others. 28 C.F.R. Pt. 35, app. A.

This necessity exception is applicable to state licensing and application processes for positions in which the licensee or position may pose a direct threat to the health and safety of the public. E.g., Doe v. Judicial Nominating Comm' n, 906 F. Supp. 1534, 1541 (S.D. Fla. 1995) (citing cases) . A state licensing board has the responsibility and the right to thoroughly inquire into an applicant's mental and physical conditions, including inquiring into an applicant's diagnosis or treatment for mental conditions. Doe, 906 F. Supp. at 1542. In this case, the Board sought specific information from Feaster regarding her diagnosis and treatment for a condition that might be a disability with the meaning of the ADA. The Board's narrowly tailored approach is designed to help the Board understand Feaster's current performance and to ensure the Board that Feaster would not in the future pose a threat to the safety of her patients.

As the court said in Alexander, addressing the plaintiff's claim that the board of medicine improperly refused to reinstate his medical license, "the Board can not exercise its duty without the discretion to consider the impact of a mental disability upon one's ability to.practice

with reasonable skill and safety. The danger of irreparable harm to the public is too great to deny the Board such discretion." Alexander, 921 F. Supp. at 488. So too, in this case, the Florida Board of Medicine nursing, and must have, the duty and the right to thoroughly inquire into Feaster's ability to safely practice in Florida.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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JOSEPH BRENNAN DONELLY

APPENDIX C

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

ELIZABETH FEASTER,
Appellant,

vs. CASE NO. 1D02-1631

STATE OF FLORIDA, DEPARTMENT
OF HEALTH, BOARD OF NURSING,
Appellee.
_____/

On Appeal from the Fourth Judicial Circuit
In and For Duval County, Florida

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TABLE OF CONTENTS

Item
TABLE OF CONTENTS
TABLE OF CITATIONS
STATEMENT OF THE CASE AND FACTS
SUMMARY OF THE ARGUMENT
ARGUMENT

ISSUE

WHETHER CONGRESS PROPERLY ABROGATED THE ELEVENTH AMENDMENT THROUGH TITLE II OF THE AMERICANS WITH DISABILITIES ACT, THEREBY OVERCOMING A STATE'S SOVEREIGN IMMONITY FROM SUIT UNDER FEDERAL LAW IN ITS OWN COURTS

A. Title II of the ADA Does Not Properly Abrogate the Eleventh Amendment 4

B. Response to Feaster's Points 9

CONCLUSION
CERTIFICATE OF SERVICE
CERTIFICATE OF COMPLIANCE WITH RULE 9.210

TABLE OF CITATIONS

Federal Cases
Alden v. Maine, 527 U.S. 706 (1999)

Alexander v. Margolis, 921 F. Supp. 482 (W.D.Mich. 1995) . . . 8

Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999) . 6,9

Association for Disabled Americans v. Florida International University, 178 F.Supp. 2d 1291 (S.D. Fla. 2001) 10

Badillo-Santiago V. Andreu-Garcia, 167 F.Supp. 2d 194 (D.P.R. 2001)

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001)

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Hason v. Medical Board of California, 279 F.3d 1167 (2002) . . 6

Jones v. Dept of Public Welfare, 164 F.Supp. 2d 490 (E.D. Pa. 2001) - 11

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Lufkin v. McCallum, 956 F.2d 1104 (11th Cir.)
cert. den. 506 U.S. 917 (1992)
1].
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276 F.3d 808 (6th Cir. 2002)

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766 So. 2d 1186 (Fla. 1st DCA 2000)

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Other Authority

Eleventh Amendment, U.S. Const.

Fourteenth Amendment, U.S. Const.

Fourteenth Amendment, U. S. Const., §5 . .

Titles I & II, Americans with Disabilities Act

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42 U.S.C. §12202

28 C.F.R. §35.130(6) & (8)

Ch. 760, Fla. Stat.

§768.28, Fla. Stat. (1) & (17)
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STATEMENT OF THE CASE AND FACTS

Feaster appeals from the dismissal, with prejudice, of her complaint against the Department of Health, Board of Nursing (Board), brought under Title II of the Americans with Disabilities Act (ADA). Her complaint included two counts. The first sought injunctive relief that the Board cease discriminating against her in violation of 42 U.S.C. §12132 and 28 CFR §35.130(6) & (8) . The second sought damages resulting from the Board's violation of her rights "under Title II of the ADA" and attorney's fees. (R:6, ¶36 & 37)

The Board moved to dismiss (R:10-11), primarily on the ground that Title II of the ADA did not properly abrogate the states' sovereign immunity. (R:14-17). By order rendered March 15, 2002, the court granted the Board's motion (R:24-6), agreeing that Feaster's claim was so barred. Feaster filed her notice of appeal on April 12, 2002.

On June 10, this Court relinquished jurisdiction to the trial court, so that Feaster could obtain and file a final order. In response, the trial court issued another order (dated June 28) dismissing Feaster's "cause" with prejudice. Feaster filed the order, in this Court, on or about July 26.

Feaster's complaint alleged she was disabled as a result of a 1998 closed head injury, which impaired her ability to perform "tasks that measure attention such as examinations." (R:2, ¶6) •1 Nevertheless, after graduating from the nursing program at Daytona Beach Community College, she took the nursing license examination at a learning center in Jacksonville. The exam was given in a room with a dozen other people taking exams, and others being tested on computers. In this allegedly "noisy and distracting" environment, Feaster failed the exam. (R:2, ¶118-14).

She then requested, with corroborating letters, that the Board accommodate her by providing a private room to

take the exam, with a 10-minute break each hour. (R:3, ¶1115 & 17). The Board declined to do so, and directed Feaster to be independently evaluated by the Intervention Project for Nurses (IPN) to determine whether she could practice as a registered nurse with reasonable skill and safety. (R:3-4, ¶1121-23). Although not specifically alleged, Feaster did not obtain a nursing license because she failed the licensing exam.[2]

'The one-volume record will be cited as (R: [page no.]).

[2]The Board does not accept several conclusory observations in Feaster's complaint. There, she declares the IPN program "groups drug and alcohol abusers with those having physical or mental impairments [;]" and, consequently, she has been stigmatized as a impaired practitioner. (R:4,111127-8). Such observations are not facts, but conclusory statements. They are speculative and call for unwarranted deductions, and must be rejected. *See* W.R. Townsend Contracting, Inc. v. Jensen Civil Const., Inc., 728 So.2d 297, 300 (Fla. 1st DCA 1999), *citing* Response Oncology, Inc. v. Metrahealth Insurance Co., 978 F.Supp. 1052, 1058 (S.D.Fla. 1997), for the proposition that appellate courts "need not accept ... conclusory allegations, unwarranted deductions, or mere legal conclusions made by a party.

SUMMARY OF THE ARGUMENT

Feaster sued the Board for damages and injunctive relief under Title II of the Americans with Disabilities Act. Title II, however, does not properly abrogate state sovereign immunity from suit under federal law in federal court). *See* Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001) (broadly holding Title I does not validly abrogate the Eleventh Amendment). Consequently, suit

cannot be brought under Title II against the Board in state court. *See* Alden v. Maine, 527 U.S. 706, 712 (1999) (holding Congress cannot, pursuant to Article I of het Constitution, abrogate state sovereign immunity from suit for damages in state court).

The great number of state and federal courts which have reached the issue since Garrett, have held that Title II does not validly abrogate the Eleventh Amendment. The Garrett decision, while expressly limiting its holding to Title I, said nothing to indicate the result would be different as to Title II. This Court should follow the great majority of courts and hold Title II does not validly abrogate the Eleventh Amendment.

Without distinguishing between Titles I and II, the Eleventh Circuit held the ADA did properly abrogate the Eleventh Amendment in Kimel v. State Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998). Kimel is no longer good law in light of Garrett, and the fact all federal circuits ruling on the issue since have found Title II does not properly abrogate. Because this Court is not bound by lower federal court decisions, it should disregard Kimel, follow the other federal circuits, and affirm the order under review.

ARGUMENT

ISSUE

WHETHER CONGRESS PROPERLY ABROGATED THE ELEVENTH AMENDMENT THROUGH TITLE II OF THE AMERICANS WITH DISABILITIES ACT, THEREBY OVERCOMING A STATE'S SOVEREIGN IMMUNITY FROM SUIT UNDER FEDERAL LAW IN ITS OWN COURTS.

A. Title II of the ADA Does Not Properly

Abrogate the Eleventh Amendment

Feaster sued the Board under Title II of the Americans with Disabilities Act (Title II), 42 U.S.C. §12131 et *seq.* Correctly relying on Garret, the trial court dismissed her complaint with prejudice. That order is reviewed de novo. Andrews v. Florida Parole Com'n., 768 So.2d 1257, 1260 (Fla. 1st DCA 2000), *rev. dism. as improvidently granted,* 791 So.2d 1093 (Fla. 2001).

Florida has not consented to suit under Title II, or waived its immunity from suit under federal law. The broadest waiver[3] of sovereign immunity is found in §768.28, Florida Statutes, but that statute waives immunity only for torts, and only "to the extent specified in this act." *See* §768.28(1). *Cf.* §768.28(17), Florida Statutes (2001) (expressly declaring no provision of the Florida Statutes "shall be construed to waive the immunity of the state or any of its agencies from suit in federal court"). Therefore, Feaster's suit can proceed only if Title II properly abrogates state sovereign immunity from suit under federal law, and thereby overcomes Florida's sovereign immunity from suit in its own courts. *See* Alden v. Maine, 527 U.S. 706, 712 (1999) (holding "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts"); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 100 (1984) (observing, in a suit based on state law brought in federal court, that "in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment").

[3]Ch. 760, Fla. Stat., is a state-level civil rights act which operates to waive sovereign immunity when a state-law discrimination claim is brought against a governmental

entity. Kionis v. State, Dent. of Revenue, 766 So.2d 1186 (Fla. 1st DCA 2000). It does not recognize any federal cause of action, and does not create a cause of action for claims such as those brought by Feaster.

Literally, Title II purports to abrogate the Eleventh Amendment. *See* 42 U.S.C. §12202 ("A State shall not be immune under the eleventh amendment . . . from an action in Federal or State court of competent jurisdiction for a violation of this chapter."). Nevertheless, such abrogation is not effective.

Garrett held Title I of the ADA, which imposes affirmative obligations upon employers, does not validly enforce §5 of the Fourteenth Amendment,[4] and therefore does not abrogate state sovereign immunity in federal court. The Court observed that the Fourteenth Amendment does not require the states, as employers, to make special accommodations for the disabled. If such accommodations are to be required they must come from positive law and not through the Equal Protection Clause. 531 U.S. at 368. Further, valid §5 legislation must be based on a pattern of discrimination by the states in violation of the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation. Garrett then held Title I satisfied neither of these requirements.

Title II fails as §5 enforcement legislation for the same reasons. Nothing in the legislative history of the ADA, found insufficient to sustain abrogation by Title I, would be sufficient to sustain abrogation by Title II. Six federal circuits, five after Garrett, have so held.[5] *See* Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999) (en banc) (extension of Title II to states was not a valid exercise of Congress' Fourteenth Amendment enforcement powers); Thompson v. Colorado, 258 F.3d 1241, *amended,* 278 F. 3d

1020 (10th Cir. 2001), *cert. denied,* 122 S.Ct. 1960 (2002); Rickenbacker v. Foster, 274 F.3d 974 (5th Cir. 2001); Garcia v. S.U.N.Y. Health Sciences Center, 280 F.3d 98 (2d Cir. 2001); Randolph v. Rodgers, 253 F.3d 342, 345 n.4 (8th Cir. 2001); Popovich v. Cuyahoga County Court, 276 F.3d 808 (6th Cir. 2002) (en banc), *pet. for cert. pending* (case no. 01-1503). *See also* Brown v. North Carolina Div. of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999), *cert. denied* 531 U.S. 1190 (2001) (federal regulation which prohibited states from charging any fee for handicapped parking placards failed, as it was based on statute (Title II) that did not properly abrogate Eleventh Amendment).

[4]Section 5 of the Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[5]Only the Ninth Circuit has sustained a Title II action against a state entity *See* Hason v. Medical Bd. of California, 279 F.3d 1167 (9th Cir. 2002). The Hason panel, however, simply relied on Dare v. California, 191 F.3d 1167 (9th Cir. 1999), *cert. denied,* 531 U.S. 1190 (2001); and concluded that since Garrett was a Title I decision it had no reason to reconsider Dare. *See* 279 F.3d at 1170.

Garcia would allow a damages claim only on proof of discriminatory animus. 280 F.3d at 111-112. Without conceding that much of Garcia is correct, the Board notes Feaster does not allege discriminatory animus. Instead, she was treated the same as non-disabled test takers; that is, she was tested under the same conditions as non-disabled persons, and later denied better treatment through special accommodation.

Feaster then alleges discrimination based on the Board's decision to require an evaluation by the IPN program, which protects the public's safety by determining

whether impaired persons can practice their profession with reasonable skill and safety. This type of discrimination is completely reasonable to ensure patients are not harmed through well-intentioned but injurious acts by impaired nurses.[6] Garrett expressly condones such:

> States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational. They could ... hold to job-qualification requirements which do not make allowance for the disabled. If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause.

Id., 531 U.S. at 367.

Popovich held that the ADA cannot be sustained as an act that enforces the Equal Protection Clause, but may be read to enforce the Due Process Clause. 276 F.3d at 812, 813. Not conceding Popovich is correct on this point, the Board simply notes Feaster has not claimed a violation of due process.

The common thread running through these cases is that the equal protection clause prohibits only that treatment of the disabled which is not rational. Title II's demand that states undertake affirmative obligations, including provision of "private" rooms to take professional licensing exams, far exceeds what the Constitution requires.

[6]As an alternative ground to sustain the order below, this Court could hold that regulation of the nursing profession- -here, to ascertain the ability of impaired nurses to competently practice-is not a service, etc. covered by the ADA. *See* Alexander v. Margolis, 921 F.Supp. 482, 488

(W.D.Mich. 1995) (questioning whether the duty of state board to license physicians was a "service" under the ADA, and holding that mentally ill doctor was not a "qualified individual with a disability" under the ADA).

These cases agree that Congress did not identify a history and pattern of unconstitutional discrimination by the states against the disabled. Thompson, 258 F.3d at 1254; Brown, 166 F.3d at 707: Reickenbacker, 274 F.3d at 982; Alsbrook, 184 F.3d at 1009-1010. Lacking this foundation, Title II cannot be considered preventive or remedial legislation, and cannot be congruent and proportional to any constitutional violation.

Because Congress did not properly abrogate the Eleventh Amendment in Title II, that law also is not a valid abrogation of state sovereign immunity from suit under federal law in state court. Therefore, the Board cannot be required to accommodate Feaster, and she cannot obtain injunctive relief, damages or fees.

B. Response to Feaster's Points

Feaster advances three related points: (A) the Eleventh Circuit's decision in Kimel upheld Title II against an Eleventh Amendment challenge; (B) that Garrett does not overrule Kimel and (C) Kimel is binding precedent on this Court. All three points are wrong. The Board will respond to them as one.

Kimel was decided 2 to 3 years before Garret. More important, the Eleventh Circuit has not addressed the issue of abrogation by Title II since Garret. As noted earlier in this brief, every circuit which has reached the issue after Garrett has found Title II not to be a valid abrogation of the Eleventh Amendment.

Also, Kimel's rationale is broad, referring to the "ADA" without once distinguishing between Title I and Title II. No facts are recited, so it cannot be discerned which title was at issue. Therefore, if not overruled by Garrett, it has no persuasiveness in light of all other post-Garrett federal circuit decision to the contrary.

Feaster relies on Navedo v. Maloney, 172 F.Supp 2d 276, 288 (D.Mass. 2001) for the proposition that Kimel upheld Title II. (initial brief, p.6). The Navedo court simply read too much into Kimel.

More significant, at least two district courts within the Eleventh Circuit's jurisdiction have recently ruled to the contrary. *See* Association for Disabled Americans v. Florida International University, 178 F.Supp.2d 1291, 1294 (S.D. Fla. 2001) (finding that "Congress did not identify a history and practice of irrational discrimination by the states" when enacting Title II, and that the Eleventh Amendment bars suit against a nonconsenting state under that law) [hereinafter FIU]. Were Kimel controlling, FIU could not have concluded Title II failed to abrogate the Eleventh Amendment.[7] *See also* Fedorov v. Board of Regents for the University of Georgia, 194 F.Supp.2d 1378, 1386 (S.D.Ga. 2002) (concluding the Board "enjoys total immunity from Plaintiff's claims under (Title II of] the ADA").

[7]The issue is now before the Eleventh Circuit, as the FIU decision has been appealed (case no. 02-10360-J) and will be argued in January 2003.

Other federal district court decisions since Garrett have held the same. *See* e. g., Key v. Grayson, 163 F. Supp. 2d 697 (E.D.Mich. 2001); Jones v. Dep't of Public Welfare, 164 F.Supp. 2d 490 (E.D.Pa. 2001); Williamson v. Georgia Dep't of Human Resources, 150 F.Supp.2d 1375 (S.D.Ga. 2001); Lieberman v. Delaware, 2001 WL 1000936 (D.Del. Aug. 30,

2001); BadilloSantiago v. Andreu-Garcia, 167 F. Supp. 2d 194 (D.P.R. 2001); Neiberger v. Hawkins, 150 F.Supp. 2d 1118 (D.C. Col. 2001); Doe v. Div. of Youth & Family Servs., 148 F. Supp. 2d 462 (D.N.J. 2001)

Although Garrett invalidated Title I only, it said nothing to indicate a different result would be reached as to Title II. The most which can be said is that the U.S. Supreme Court simply has not yet decided whether Title II validly abrogates the Eleventh Amendment.

Feaster concludes by urging that Kimel, as an Eleventh Circuit decision, is binding precedent on Florida courts. (initial brief, p.9-14). The first case she cites, Mobil Oil Corp. v. Shevin 354 So.2d 372 (Fla. 1977), is a prominent case on collateral estoppel. It has no bearing on this case, as the parties in Kimel were not identical to the parties here. *See* Mobil Oil, 354 So.2d at 374 (noting the "essential elements of the doctrine are that the parties and issues be identical ....").

As an Eleventh Circuit decision, Kimel is not binding on this Court, as "lower" federal court rulings are not binding on state courts. State v. Dwyer, 332 So.2d 333, 335 (Fla. 1976); Titus v. State, 696 So.2d 1257, 1263 (Fla. 4th DCA 1997) ("Moreover, a Florida District Court of Appeal takes its direction on matters of federal constitutional law first from the United States Supreme Court and, in the absence of definitive precedent from that Court, from the Florida Supreme Court."), *approved with opinion* 707 So. 2d 706 (Fla. 1998)

Feaster also ignores the obvious. The Garrett decision, issued after Kimel, changed the law. It broadly held Title I of the ADA did not properly abrogate the Eleventh Amendment, and gave no indication the result would be different had the Court chosen to address Title II. This change in the law eliminated whatever persuasiveness

remained in Kimel.

In light of Garrett, and the fact all other federal circuits ruling afterward have reached the opposite conclusion, Kimel has been completely undermined and is not binding even in the Eleventh Circuit itself.[8] *See* U.S. v. Gallo, 195 F.3d 1278, 1284 (11th Cir. 1999) ("As a rule, our prior precedent is no longer binding once it has been substantially undermined or overruled by either a change in statutory law or Supreme Court jurisprudence or if it is in conflict with existing Supreme Court precedent." (e.s.]); Lufkin v. McCallum, 956 F.2d 1104, 1107 (11th Cir.) ("A panel of this Court may decline to follow a decision of a prior panel if such action is necessary in order to give full effect to an intervening decision of the Supreme Court of the United States."), *cert. den.* 506 U.S. 917 (1992). It would be absurd to consider Kimel binding here.

8 Feaster's statement to the contrary (initial brief, p.13) is wrong. Under her logic, no U.S. Supreme Court case would supercede an earlier Eleventh Circuit decision, unless the Eleventh Circuit's decision itself were reversed.

Feaster then advances several decisions in which the Eleventh Circuit discusses the importance of adhering to its precedent until overruled en banc or by the U.S. Supreme Court. (initial brief, p.11-14). These cases are simply inapposite. The Board is not asking this Court to disregard its own precedent, or that of the Florida or U.S. Supreme Court. Instead, it is asking this court to follow Garrett's logic, disregard Kimel's badly undermined holding as to Title II, and reach the same result as every federal circuit that has re-visited issue since Garrett: Title II does not validly abrogate the Eleventh Amendment.

CONCLUSION

The June 28, 2002 order dismissing Faster's complaint must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify a true copy of this answer brief has been sent by U.S. Mail to Appellant's counsel, JIMMY CHARLES, 215 Celebration Place, Suite 500, Celebration, Florida 34747; this 4th day of October, 2002.

CERTIFICATE OF COMPLIANCE WITH RULE 9.210

I certify Courier New 12-point, non-proportionately spaced type is used in this brief, in accord with Fla.R.App.P. 9.210 (a) (2).

Charlie McCoy
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